Cleveland Real Estate Partners *and* United Food and Commercial Workers Union Local No. 880 AFL–CIO, CLC. Case 8–CA–25668

January 27, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, BROWNING, AND COHEN

On September 2, 1994, Administrative Law Judge Nancy M. Sherman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cleveland Real Estate Partners, Mayfield Heights, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951) We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) by demanding that the Union stop handbilling, and by calling the police to eject the handbillers, we rely on the judge's finding that the Respondent knew and permitted other organizations to solicit and distribute on Eastgate Plaza property. See, e.g., *Richards United Super*, 308 NLRB 201 (1992); *K Mart Corp.*, 313 NLRB 50, 58 (1993). We find it unnecessary to rely on the judge's additional finding that, even if the Respondent did not know that others were soliciting and distributing on Plaza property, it nonetheless violated the Act by excluding the union handbillers.

We find *NLRB v. Great Scot, Inc.*, 39 F.3d 678 (6th Cir. 1994), denying enf. 309 NLRB 548 (1992), distinguishable. In *Great Scot*, the respondent argued, and the court of appeals found, that the General Counsel failed to substantiate the area-standards claim of the union handbillers. This case does not involve area-standards handbilling. Further, in this case the judge found that there was no evidence or claim that the handbills contained any factually inaccurate statements.

Paul C. Lund, Esq., for the General Counsel.
Maynard A. Buck, Esq., of Cleveland, Ohio, for the Respondent.
Melvin S. Schwarzwald, Esq., and *Todd M. Smith, Esq.*, both of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

NANCY M. SHERMAN, Administrative Law Judge. This case was heard before me in Cleveland, Ohio, on April 12, 1994, pursuant to a charge filed against Respondent Cleveland Real Estate Partners by United Food and Commercial Workers Union Local No. 880 AFL–CIO, CLC (the Union) on July 30, 1993; an amended charge filed by the Union on September 24, 1993; and a complaint issued on November 30, 1993. The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by interfering with (by summoning the police and otherwise) the Union's efforts to handbill adjacent to a store in a shopping plaza, which Respondent is the property manager.

On the basis of the entire record in the case, including the demeanor of the witnesses, and after due consideration of the ''hearing brief'' filed by Respondent before the hearing and the posthearing briefs filed by Respondent and by counsel for the General Counsel (the General Counsel), I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is an Ohio general partnership with an office and place of business in Cleveland, Ohio. Respondent engages in property management at various facilities in the greater Cleveland, Ohio area, including a strip mall in Mayfield Heights, Ohio (Eastgate Plaza or Plaza), the only location involved here. In the course and conduct of these business operations, Respondent derives gross revenues in excess of $100,000, of which in excess of $25,000 is derived from businesses which meet the Board's jurisdictional standards on other than an indirect basis. I find that, as Respondent admits, Respondent is an employer engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act. *Carol Management Corp.*, 133 NLRB 1126 (1961); *Giant Food Stores*, 295 NLRB 330, 335 (1989), reconsideration denied 298 NLRB 410 (1990).

The Union is a labor organization within the meaning of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Eastgate Plaza is owned by Eastgate Associates, a partnership that consists of the Marlo Partnership (the identity of whose partners is not shown by the record), Peter L. Galvin, Thomas W. Adler, and James C. Rogers. Respondent, which manages the Plaza, is a partnership whose members are Eric D. Friedman, Galvin, Adler, and (at the time of the events here at issue) Rogers.[1]

[1] John A. Maglosky, who is Respondent's property manager for Eastgate Plaza, testified that he did not recall the date when Rogers was bought out as one of Respondent's partners. However, Rogers is listed as a partner on the letterhead of letters from Respondent on July 21 and 27, 1993, which sought the removal of the union handbillers from the Plaza and threatened to call the police if the

At all times relevant here, Respondent performed its duties at the Plaza pursuant to a contract with Eastgate Associates. Under this contract, Respondent undertook to ''supply all services pertaining to management and operation of the Property,'' and to ''provide adequate and suitable, qualified personnel, facilities and equipment for the performance of such functions.'' Respondent was ''authorized to employ, supervise and discharge such employees as may be reasonably required for the operation of the Property.'' Wage and related expenses for ''operating employees,'' as well as other expenses, including services ''related to cleaning, security, maintenance, utilities and the purchase of all supplies,'' were to be paid to Respondent from a bank account into which rental payments from Plaza tenants were to be deposited. Respondent's compensation consisted of a percentage of the ''gross monthly receipts from any source received from the Property.'' In addition, Respondent was to receive commissions for obtaining new leases, lease renewals, or lease extensions. Eastgate Associates undertook:

> (a) To indemnify and save harmless [Respondent] from all damage, loss or liability, and all expense, cost or charge in connection therewith, growing out of or arising in connection with [Respondent's] management and leasing of the Property in compliance with the terms hereof . . . but excluding any such liability arising from any negligent or intentionally tortious or criminal act or omission by [Respondent].
>
> (b) To defend promptly and diligently, at [Eastgate Associates'] sole expense, any claim, action or proceeding brought against [Respondent] arising out of or connected with any of the foregoing . . . provided, however, that [Respondent] shall be responsible for any such act, default or negligence that is due directly or indirectly to [Respondent's] own negligent or intentional tortious or criminal act or omission.

The handbilling here in question took place in the Plaza, on the sidewalk in front of a retail store called Marc's. At all times relevant here, Marc's was renting that store under a lease which called for rental payments consisting of a fixed rent, a percentage of Marc's gross sales, plus a ''contribution to the cost of maintaining and operating the Common Areas,'' including ''police and security.'' ''Common areas'' were defined as including ''sidewalks and walkways.'' Marc's ''use and occupation of the Premises . . . shall include . . . the non-exclusive use by [Marc's], its agents, customers, employees and invitees, in common with others entitled thereto, of the Common Areas subject to reasonable rules and regulations prescribed by [Eastgate Associates] from time to time . . . [Eastgate Associates] may grant the use of the common areas to others from time-to-time with or without charge therefor, so long as such usage does not significantly interfere with [Marc's] or [Marc's] agents, customers, employees and invitees use thereof.'' Marc's was required to be open every day of the week except Sunday, to open no later than 10 a.m., and to close no earlier than 6 p.m. 3 or 4 days a week and no earlier than 10 p.m. the remaining days, except during (inter alia) strikes and lockouts ''so long as [Marc's] shall make all reasonable efforts to shorten such periods.'' Marc's was forbidden to ''display merchandise outside the Premises, [or] in any way obstruct the sidewalks adjacent thereto.'' Marc's was to use the leased premises solely as a ''drug store including sale of health and beauty aids and items sold in large drug stores,'' and was forbidden to ''engage in the same, similar or competing business within three (3) miles of the Premises.''

The record fails to show the terms of the leases of any of the other establishments in the Plaza. Many of the stores are open on Sundays, and all of them are open on Saturdays. Some of the stores are open around the clock. The banks in the Plaza close at 6 p.m.; about 20 percent of the stores are closed by 7 p.m., and 90 to 95 percent are closed by 10 p.m.

B. *The Geography of Eastgate Plaza*

Eastgate Plaza occupies the northeast corner of the intersection of Mayfield Road (State Route 322) and S.O.M. Center Road (State Route 91) in Mayfield Heights, Ohio; both of these roads are four-lane roads with a turning lane in the middle, and with a posted speed limit of 35 miles per hour. The west frontage, on S.O.M. Center Road, is about 1900 feet and is served by four driveways from S.O.M. Center Road, two or three of which are controlled by traffic lights. The south frontage, on Mayfield Road, is about 500 feet and is served by two driveways from Mayfield Road, the easternmost of which is controlled by a traffic light. Sidewalks on public property edge the entire frontage of the Plaza. The Plaza contains two strips of stores, which a map in the record designates as strip A and strip B, respectively. Strip A parallels the north boundary of the Plaza, and its 8 store fronts face south. Strip B parallels the west boundary of the Plaza; most of its 35 stores face west, the exceptions including several stores which face Mayfield Road on the south.[2] The north end of strip B is separated from the strip A store fronts by parking lots and two-lane driveways.[3]

Marc's occupies the second store from the western end of strip A. Its total frontage is about 227 feet.[4] The sidewalk (owned by Eastgate Plaza Associates) in front of that store

handbillers did not leave. Respondent did call the police to remove the handbillers on July 28, 1993. See infra sec. II,D.

[2] Some of the spaces described herein as ''stores'' are vacant. Some of the establishments described herein as ''stores'' are in fact other kinds of businesses, such as banks, restaurants, and a post office.

[3] Two-lane driveways also separate the east end of strip A and part of the east (rear) side of strip B from the west frontage of a strip of stores which the map designates as strip C. Strip C is on land physically contiguous to Eastgate Plaza, and is accessible by means of an easement through the Plaza. Although strip C apparently looks to an outside observer as part of the Plaza and does not front on a public road, strip C is not owned by Eastgate Associates.

[4] This finding is based on measurements taken by union organizer John Madzelonka on an undisclosed date between July 1993 and April 1994. John A. Maglosky, who is Respondent's property manager of the Plaza, testified that the frontage is 120 feet. However, he based this testimony on Marc's lease, which was executed in August 1983. A site plan attached to the lease shows about 15 stores in strip A. Madzelonka's 1993 or 1994 map shows 8 stores in strip A. Maglosky testified that Marc's had expanded since 1983, that all the stores in strip A had the same depth, and that the length of strip A from east to west had never been changed. I infer that at some time after 1983 but before Maglosky started working for Respondent in January 1992, Marc's took over what in 1983 had been the frontage of other stores in strip A.

is 12 feet wide.[5] Part of Marc's frontage is occupied by a corral bounded by a series of posts so spaced (at intervals of about 2 feet) as to enable pedestrians to walk between them but to prevent customers from wheeling shopping carts from Marc's into the parking lot. Marc's store has one entrance doorway and one exit doorway, which are separated by a considerable distance. The corral extends continuously along the sidewalk, including the frontage of both doorways. The corral is 150 to 170 feet long.[6] The row of posts nearest the driveway/parking lot area is about 2 feet north of the southern edge of the sidewalk.

Respondent took over the management of the Plaza in January 1992. Since at least 1986, and at all material times until about August 1993 (see infra sec. II,E), a sign stating ''No solicitors allowed'' was fastened to a post in a grassy area between the S.O.M. Center sidewalk and the Plaza parking lot. The sign faced west and almost abutted the sidewalk; the width of the post (which may have been a utility pole) would likely conceal even the existence of the sign from anyone east of the grassy area; and the sign (which when posted had been near a then driveway into the Plaza) was not located near any of the driveways which existed after a 1991 redesign of the Plaza parking lot. A similar sign was posted, at least since 1986, in a grassy area (possibly on public property) between the Plaza parking lot and Mayfield Road. This sign, which faced away from the Plaza parking lot and was visible from Mayfield Road, was to the left (west) of the signal-controlled driveway from Mayfield Road into the Plaza;[7] this driveway was the driveway most distant from Marc's. Both of these signs were rather battered but perfectly legible. A ''No soliciting allowed'' sign was also placed to the left (north) of the southernmost of the four driveways into the Plaza from S.O.M. Center Road. The record fails to show the locations from which it could be read, or its legibility. Union Organizer Madzelonka, who was in charge of the handbilling at issue here and who participated therein until about July 24, 1993, credibly testified that when entering the Plaza, on one occasion or another he used all the driveways from S.O.M. Center Road, and never saw any ''No Solicitation'' signs. Tim Behannesey, who participated in the handbilling for 24 hours during the week ending July 14, 1993, and for 38 hours each week thereafter until the handbilling ended, credibly testified that while he was there, he never observed any ''No Solicitation'' signs.

C. *The Handbilling*

The Marc's in Eastgate Plaza is one of a chain of at least four stores in various cities in Ohio. The employees of these stores are not union-represented. About June 1993,[8] the Union ordered the printing of a number of handbills (the ''raisin'' handbills) which were illustrated with cartoon-like pictures of worms in raisin boxes. The handbills alleged that in September 1991 a sanitarian from the local board of health had found live and dead meal moths in four out of six boxes of raisins on Marc's shelf the day after Marc's (according to it) had removed its raisins in response to a customer's complaint that her daughters began vomiting after eating worm-infested raisins bought from Marc's. The handbill went on to say, ''Marc's employees will probably not tell anyone about their Company selling food that is not fit for human consumption, because they have no union to protect them. Shop at these fine neighborhood stores where members of [the Union] make sure the products you buy are fresh and wholesome.'' Then, the handbill named eight neighborhood stores, including two stores (Finast and Revco) with branches in strip B of Eastgate Plaza. At the bottom of the handbill, in relatively small but easily legible printing, were the Union's name, address, and telephone number. The employees of Finast (a grocery) and Revco (a discount drug store) are represented by the Union, and sell the same type of articles that are sold at Marc's.

Madzelonka, who is employed by the Union as an organizer, was given the assignment of setting up the handbilling for the Marc's at Eastgate Plaza. Before the handbilling began, he advised a local police lieutenant that the Union was going to be handbilling in front of Marc's on June 26. The lieutenant said, ''Just make sure you're not in the parking lot and blocking all the cars.'' Madzelonka replied that this would be no problem, that the handbillers would be up by the door. He made no effort to learn the identity of or get in touch with the owner of the Plaza.

The handbilling began on June 26 with the distribution of the ''raisin'' handbills; distribution of the ''kids'' handbills began about July 23. The handbills were distributed from 10 a.m. to 8 p.m. on weekdays, and from 10 a.m. to 6 p.m. on Sundays. Usually, four to five handbillers were there at any one time, although on occasion there were as few as two or as many as seven. The handbillers distributed their handbills while standing in those portions of the sidewalk between the corral posts and the parking lot/driveway, mostly a strip about 2 feet wide. Madzelonka was present during and, inferentially, participated in the handbilling during most, but not all, of the time it was proceeding. However, all but about 3 of the approximately 30 individuals who engaged in this handbilling were rank-and-file union members who worked as employees in shops represented by the Union, members of such employees' families, or friends of such employees. Some of such handbillers worked for the unionized firms which the handbills urged the recipients to patronize in preference to Marc's; some of the handbillers worked in the Plaza itself for two of the listed unionized stores (Finast and Revco). Except for the participating members of the Union's regular paid staff, who performed such tasks as part of their regular work duties, the handbillers were paid $4.50 an hour by the Union for their services—less than the hourly wage paid to the handbilling employees by Finast and Revco for work performed for them, less than most of the other handbillers were paid from regular employment elsewhere, and 25 cents an hour more than the minimum wage prescribed by Ohio law for most employers and most employees (Ohio Rev. Code § 4111.02). The lowest gross pay to any in-

[5] This finding is based on the site plan, which is drawn to scale, attached to Marc's lease.

[6] The map drawn by Madzelonka indicates a length of about 170 feet; he testimonially gave the distance as about 150 feet. Maglosky testified that the corral spanned half the store frontage, which I have found to be about 230 feet. However, his testimony as to distances is not particularly accurate; see supra fn. 4.

[7] When viewed in the light of Madzelonka's map, the photograph of this sign received into evidence indicates that the driveway was separated from the sign by a distance sufficient to include the total frontage of a fast-food restaurant, a travel agency, and an optical shop.

[8] All dates hereafter are 1993 unless otherwise stated.

dividual handbiller for any one week was $9, received by Margaret Snider for 2 hours' handbilling during the week ending July 7. The highest gross pay to any individual handbiller for any one week was $171, received by Tim Behannesey for 38 hours of handbilling during each of the weeks ending July 14 and 21. Behannesey's wife worked for Finast, he learned about the job through one of her friends who also worked for Finast, and at that time he had no employment with any employer other than the Union. During the period that the handbilling continued, the paid handbillers averaged between 11 hours for the week ending June 30 and 21 hours for the week ending July 21, a week each.

The costs of printing the handbills, and the handbillers, were paid out of a union ''assessment fund''; Madzelonka testified:

> Our members pay into an assessment fund to help with the help take on the nonunion stores or whatever to try to protect their jobs. They pay into a fund that pays for, basically, on top of the dues, for the handbills, or if we have a picket line, the signs. Plus, on top of that basically . . . it pays for their . . . the payroll as far as to pay them for their time that they spend out there . . . that [$4.50 an hour] was the supplement . . . so they could get their assessment money back that they were paying in.

Madzelonka testified that the purposes of the handbilling were to inform the public about the conditions at Marc's, to tell the public that Marc's was a nonunion store, and to ask the public to shop at union stores in the area. Prior to or during the period that the handbilling occurred, the Union did not use any other mode of communication (including handbilling on the public sidewalks outside the Plaza) to reach the consumers whom the Union tried to reach through its handbilling at Marc's in the Plaza.

D. The Removal of the Handbillers

At all relevant times, Respondent has employed George McAdoo as its only maintenance person at the Plaza. About June 28, McAdoo received a page that the manager of Marc's wanted to see him. McAdoo then went into Marc's and spoke to the manager, who said that the handbillers ''were bothering his people coming in.''[9] McAdoo then approached the handbillers, they tried to give him a handbill, and he told them that they would have to leave the premises because ''it's not allowed in the center.'' One of the handbillers, identified in the record as a ''middle-aged girl,'' replied that she could indeed distribute the handbills, and read something to him. He said that there was no soliciting in the center, she got ''kind of smart'' with McAdoo, and he left.[10]

On an undisclosed July date before July 23, inferentially about July 20, the Union ordered the printing of a number of handbills (the ''kids'' handbills), which were illustrated by drawings of young children working or showing signs of distress. These handbills alleged that the United States Department of Labor had found that Marc's had broken the child labor laws more than 2000 times; and that according to the Federal official who conducted the investigation, ''kids'' in Marc's employ had been required to work excessive hours on more than 1900 occasions and had illegally operated dangerous equipment on more than 200 occasions. The handbills went on to say, ''The kids who work at Marc's undoubtedly do not protest when asked to work long hours or operate dangerous equipment because they have no union to fight for them while protecting their jobs. Shop at these fine neighborhood stores where [the Union] is available to protect younger workers against child labor law violations.'' The handbills ended by listing the same stores as did the ''raisin'' handbills, and gave the Union's name, address, and telephone number.

McAdoo testified that on the day after this incident, he again talked to the handbillers—including the ''middle-aged girl'' and, this time, Behannesey—to stop their handbilling. This conversation was denied by Behannesey. McAdoo dated this alleged conversation, in effect, as having occurred no later than July 2 (see supra fn. 10), and the Union's business records show that Behannesey did not begin to handbill until the week ending July 14. For these and demeanor reasons, I credit Behannesey's denial.

Madzelonka, who was physically present during the handbilling most of the time until July 24, testified that nobody ever complained to him about the manner in which he was handbilling. Behannesey, who handbilled for 24 hours during the week ending July 14 and 38 hours during each of the next 2 weeks, testified that laying to one side one conversation in late July with someone who claimed to be the property owner (see infra), until the arrival of the police on July 28 nobody ever approached Behannesey concerning his presence at the Plaza. McAdoo initially testified (on cross-examination) that he told the handbillers to leave four or five times; then, that he told them to leave ''a hundred times . . . continually,'' ''perhaps a couple of times a day and it might have been'' five or six times a day; and then, on redirect examination, that he talked to the handbillers ''quite a few times . . . at least 10 times.'' For demeanor reasons, and in view of McAdoo's widely varying testimony about the number of times he talked to the handbillers, I credit Madzelonka and Behannesey, find that McAdoo made only the request described supra, and further discredit his testimony on redirect examination about a conversation where he allegedly pointed out the existence of the old no-solicitation signs, stat-

[9] See infra fn. 10.

[10] My findings in this paragraph are based on credible parts of McAdoo's testimony. Unlike his credible testimony on cross-examination, his testimony on direct examination indicates that his communication with Marc's manager consists of a telephone conversation, and that it was this conversation which prompted him to come to the handbilling area. My findings as to the date are based on his testimony that he had a second conversation with the handbillers on the following day, that he thereafter told John A. Maglosky (Respondent's property manager of the Plaza) about the handbilling, and that this conversation with Maglosky took place in a matter of 5 working days after the handbilling began; and on the evidence (including union business records) that the handbilling began on Saturday, June 26. However, for reasons stated, infra, I do not credit McAdoo's testimony that he had a second conversation with the handbillers or that he reported the handbilling matter to Maglosky. Further, in view of McAdoo's testimony about the date of this alleged report, and in view of the areas where he performed his job (see infra sec. II,F), I do not credit his testimony that he did not find out about the handbilling until his conversation with Marc's manager.

ed that the handbillers were not shoppers, and stated that even if they bought something, they could park for only 2 hours.

Since Respondent took over the Plaza in January 1992, Respondent's manager of that property has been John A. Maglosky. About July 14, 1993, when Maglosky was personally visiting the Plaza, Marc's manager asked him, ''Is there anything you can do about the handbillers?'' About the same time, a representative of the Shoe Connection, a strip A store which is the second store east of Marc's, told Maglosky that a couple of Shoe Connection's customers had said that they did not appreciate being ''harassed'' by the handbillers, and had asked what was going on. Shoe Connection's representative asked Maglosky whether there was anything he could do about it. Maglosky did not ask what was meant by the term ''harassed,'' and never talked to any of the customers. Nobody else ever raised any complaints, to Maglosky's knowledge.

On an undisclosed date after receiving these comments from Marc's and the Shoe Connection, but before July 21, Maglosky explained to Rogers (who at that time was a partner in Respondent and in Eastgate Associates) what was going on, and said that ''we would monitor the situation and seek legal counsel.'' Rogers said that he ''didn't like it going on,'' that he would have to contact legal counsel also, and that he would get back to Maglosky. Both Rogers and Maglosky consulted the same counsel, Maynard A. Buck, who represented Respondent at the instant hearing (see supra sec. II, A). On an undisclosed later date before July 21, Rogers requested Maglosky that the handbillers be removed.

Behannesey credibly testified that late in July but before July 21, a man approached him while he was handbilling, identified himself as the property owner, and asked the handbillers to leave, to which Behannesey replied that he thought they had a right to be there and that they were not going to leave. Still according to Behannesey's credible testimony, the man did not say who he was or what company he was with. Maglosky testified as the first witness that a day or two before July 21, he went out to the union handbillers and told them that they were not supposed to handbill. Although Maglosky was in the hearing room when Behannesey testified and Behannesey was the last witness who testified, Behannesey was not asked whether the alleged ''property owner'' was Maglosky, nor was Maglosky asked whether Behannesey was present during Maglosky's conversation with the union handbillers about handbilling. Nevertheless, I infer that both were describing the same incident, during which Maglosky unsuccessfully asked the Union to stop handbilling.

By letter to the Union's president dated July 21, Maglosky stated, in part, ''Due to numerous requests/complaints from tenants and patrons at [Eastgate Shopping Center], we are asking that you direct your representatives to cease handing out the flyers in front of the Marc's store, or anywhere else on the private property of the shopping center.''[11]

By letter to Maglosky dated July 22, 1993, Union Attorney Mark A. Rock stated, in part:

> Please be assured that Local 880 is not interested in generating complaints from tenants or patrons of the Eastgate Shopping Center. Local 880 has made every effort to insure that the handbilling is done peacefully, professionally, safely, and without blocking ingress or egress. Accordingly we are surprised that you have received complaints.
>
> We want to address your concerns. Please call me so that we may set up a meeting with representatives of Eastgate and representatives of Local 880 to work out a mutually acceptable solution to the concerns which have been raised.

A memorandum from Maglosky dated July 27, and faxed to Rock, stated:

> I have tried to call you several times, and I have left messages with no response. Please be advised that before any discussion can take place regarding the solicitation/hand billing at Eastgate Shopping Center, the practice of same should cease. If the solicitation hand billing continues, we will have the police department escort the individuals from the property.

These were the only such letters that Respondent ever sent to groups of individuals telling them to cease soliciting at the Plaza.[12] Maglosky testified that the July 22 letter did not mention any rule against solicitation or distribution because ''I didn't think it would be necessary.'' He further testified that Respondent has no written policy forbidding solicitation or distribution.

On or shortly before July 28, Maglosky advised the Mayfield Heights police that the handbillers were violating a city ordinance which (he believed) prohibited handbilling, and asked that the handbillers be removed. On July 28, the Mayfield Heights police approached the handbillers and told them that they had to leave the property. When handbiller Behannesey asked why they were being asked to leave, one of the officers gave him a copy of the following city ordinance:

> 547.09 LOITERING ON PRIVATE PROPERTY.
>
> (a) No pedestrian, loiterer, member of a loitering gang or group or other person shall intentionally block ways and entries to or congregate on private property in the nonresidential districts of the City, as specified on the Zone Map which is part of the Zoning Code, where business is conducted or services rendered and an invitation to enter is made to members of the public, express or implied, for such purpose. No such person shall interfere with the intended use of parking lots ad-

[11] Because Maglosky's first action (so far as the record shows) with respect to the handbilling took place within a week of his receiving the handbilling reports from Marc's and Shoe Connection about July 14, because McAdoo attached an approximate July 2 date to his alleged report to Maglosky about the handbilling, because Maglosky initially denied receiving any reports about the matter from McAdoo, and for demeanor reasons, I do not credit the testimony of McAdoo and (eventually) Maglosky that McAdoo made such a report.

[12] Maglosky testified that he had not written such a letter to any other soliciting group because ''Generally, after approaching an individual in person if we do catch him on the site soliciting or handbilling, we ask him to cease; and generally they do cease.'' However, he testified to having prevented only one incident of soliciting on the Plaza (this being a restaurant's insertion of advertisements under the windshield wipers of cars parked in the Plaza parking lot) which he dated as before the handbilling incident.

jacent to such business or part of the same property where the business is located. It shall be prima-facie evidence of such intent when such person continues to loiter or block passage, or when such person remains, after being requested by a police officer or owner, lessee or person in charge of the property to move on.

(b) Whoever violates this section is guilty of a misdemeanor of the fourth degree. Punishment shall be as provided in Section 597.02.

The handbillers requested and received the opportunity to telephone the Union. The Union said that it did not know exactly what to do at the moment, and told the handbillers to leave; they did so.

Before the police directed the handbillers to leave the premises, they had distributed about 36,000 copies of the ''raisin'' handbill and an undisclosed number of the 12,000 copies of the ''kids'' handbill which the Union had ordered. There is no evidence or claim that the handbillers ever acted in other than an orderly manner, blocked customers, or interfered with automobile or pedestrian traffic. Laying to one side the remarks by Marc's and Shoe Connection, which Maglosky testified were the only complaints he knew about, there is no evidence that any of the shoppers or businesses on the Plaza ever complained about the handbillers. There is no evidence or claim that the handbills contained any inaccurate factual statements.

E. Changes in Signage at the Plaza

About July 21, while the handbilling was still in progress, McAdoo posted, in undisclosed locations on the Plaza, signs which stated that parking was limited to 2 hours and set forth the section number, but not the contents, of a city ordinance.[13] After this notice was posted, the handbillers moved their cars every 2 hours.

Thereafter, in July or August, McAdoo removed the three ''No solicitors allowed'' signs which had been installed before 1986, and installed a new ''No soliciting'' sign at each of the six driveways which then connected the Plaza with a public road.

F. Respondent's Conduct in Connection with Distribution and Solicitation Generally

Maglosky, who is the Respondent's property manager for the Plaza, also acts as Respondent's property manager for an office building, in downtown Cleveland, which is near Respondent's office. Maglosky visits the Plaza, which is about 20 miles from his office, three to four times a week, for periods ranging from a half-hour to a full day. On a Saturday or Sunday at least twice a month, he spends a maximum of 1 hour driving through the Plaza. On occasion, he drives through the Plaza as early as 6 a.m., before most of the stores have opened for the day; but many of his inspections occur during the hours that the stores are open. He sometimes drives only by the rear of the buildings, and may not see the front of the buildings for as long as a week.

So far as the record shows, McAdoo is the only other employee of Respondent who works at the Plaza. McAdoo's usual working hours are 7 a.m. to 3:30 p.m. Monday through Friday, although he occasionally works there on weekend days, most typically in order to clear snow; as previously noted, some of the Plaza establishments are open around the clock, all of the stores are open until at least 6 p.m. Monday through Saturday, some of them do not close until 10 p.m., and some of them are open on Sunday. McAdoo's job consists of maintaining the buildings, answering all calls from stores, and looking over the site of the Plaza. He makes daily reports to Maglosky, inferentially by telephone, about ongoing projects or happenings (especially unusual ones) in the Plaza. In order to enable McAdoo to perform his duties at the Plaza, he has been afforded the use of a red pickup truck. Madzelonka credibly testified that while he was handbilling, he saw McAdoo at least once a day, and perhaps as often as four times a day, emptying the trash and purchasing a snack at Marc's.[14] Behannesey, who handbilled for 24 hours during the week ending July 14 and for 38 hours during the weeks ending July 21 and 28, credibly testified that he saw McAdoo almost every day emptying the garbage cans and driving around the complex in a red pickup truck. Behannesey further credibly testified that on occasion, while he was handbilling, McAdoo parked his truck right in front of Marc's and went into Marc's to make a purchase from its soda vending machine. McAdoo credibly testified that on occasion, his duties (for example, repairing a roof) prevent him for periods, which may be as long as a full day, from observing events at the Plaza.

Laying to one side the ''No solicitors allowed'' signs (which were initially posted before Respondent became the property manager in January 1992), Respondent does not have a written policy against solicitation and distribution at the Plaza. Maglosky credibly testified that when he became the Plaza property manager in January 1992 he told McAdoo that if he became aware of any type of solicitation or distribution to notify Maglosky. On direct examination by Respondent's counsel, Maglosky further testified that he had instructed McAdoo to enforce the at least alleged ''no solicitation policy'' consistently; Maglosky was not asked the date of these alleged instructions, or whether they were issued before the union handbilling incident. McAdoo credibly testified on cross-examination that he did not recall Maglosky's talking to him about the alleged ''no solicitation rule'' before the union handbilling incident.[15] Maglosky credibly testified in April 1994 that McAdoo had never brought to his attention any types of solicitation (see infra fn. 24). As an adverse witness called by the General Counsel, Maglosky further testified that the only incidents of solicitation or distribution he had ever prevented from occurring at the Plaza were a donation pot maintained by the Salvation Army in December 1993 and conducted by a Hunan restaurant (not located in the Plaza or affiliated with the Hunan restaurant in the Plaza)

[13] The record fails to show the section number or contents of this ordinance.

[14] Madzelonka testimonially attributed this conduct to the driver of the red pickup truck. There is no evidence that Madzelonka knew McAdoo's name at any material time.

[15] On redirect examination by Respondent's counsel, when asked whether Maglosky talked with McAdoo about the alleged ''no solicitation'' rule when Maglosky became property manager, McAdoo testified, ''That I'm not sure of.''

in putting restaurant advertisements under the windshield wipers of cars parked in the Plaza parking lot.[16]

The General Counsel's witnesses included Susan Magocsy, who worked 40 hours a week at a union-represented store in the Plaza between early 1986 and late March 1994 (except for 1990 and 1991) and thereafter visited the Plaza from time to time as a customer. Her working hours at the Plaza varied—sometimes, 9 a.m. to 6 p.m. and sometimes (her usual Friday schedule) 2 to 11 p.m. I found her a wholly credible witness.

Magocsy credibly testified that while she was working at the Plaza (but without otherwise giving dates), the Salvation Army ''would have their kettle out for Christmas, collecting money.'' McAdoo testified that around Christmas 1993, after the Union had filed the instant charge, he observed the Salvation Army soliciting in front of the Finast store; that when he asked them to leave, they said that Finast had allowed them to solicit there; that he then told Finast's manager that the Salvation Army could only solicit inside the store and could not be ''on the canopy''; and that ''the next day they were gone . . . I think they left after I talked to the manager.'' Maglosky testified that in December 1993, after the Union had filed the instant charge, he saw the Salvation Army with its donation pot and asked them not to solicit, and that nobody had complained to him about the Salvation Army's presence. I infer from the testimony summarized in this paragraph that in Christmas seasons before 1993 (perhaps including 1992) the Salvation Army had solicited donations on the sidewalks in the Plaza, but that in December 1993 the Salvation Army abandoned this activity after receiving the foregoing communications from Maglosky and McAdoo.

In the summer of 1992, a Hunan restaurant which was not located in the Plaza put advertising handbills under the windshield wipers of cars parked in the Plaza. Maglosky called the owner and asked him to cease; he did so. Nobody had complained to Maglosky about the handbilling. One of the businesses in the Plaza is a Hunan restaurant not affiliated with the handbilling restaurant.

Magocsy credibly testified that in 1993, an automobile service station put advertisements for car repairs under the windshield wipers of car parked in the Plaza. She further credibly testified to similar conduct by a Chinese restaurant a month or two later.

McAdoo testified on direct examination that on a ''lot'' of occasions whose dates he was not asked to give, he noticed that literature was being given to Plaza customers or tucked under the windshield wipers of cards parked in the Plaza, and that ''I run them off because the only thing that people do is pick them up, look at them, and throw them on the ground.'' He went on to testify that when he asked groups or businesses which were distributing literature on the Plaza to leave the Plaza, some of them left and some did not; and that when they did not leave, ''I'd call the police and have them taken out, but I've never had to yet''; on cross-examination, he testified that he did not have the authority to call the police, at least in connection with solicitation and distribution. He further testified on cross-examination that he had reported such literature distribution to Maglosky a few times, and that McAdoo made such reports when a person engaged on a second occasion in the distribution of material which asked customers to shop at locations other than the Plaza. I find that on occasion, in order to minimize litter which he would have to clean up, he asked persons to stop distributing literature. However, for demeanor reasons, I credit Maglosky's denial (see infra fn. 24) of McAdoo's testimony that he reported to Maglosky repeated instances of distribution to benefit off-Plaza stores.

On an occasion between April and September 1992, a jewelry store in the Plaza told McAdoo that some people were selling jewelry, and distributing advertisements therefor, in the Plaza. McAdoo told the itinerant jewelers that they could not sell their jewelry in the Plaza any more and would have to leave. Inferentially, they complied.

Magocsy credibly testified as follows: In May 1992, her working hours at Finast were 6 a.m. to noon. For a continuous 2-week period during May 1992, she saw during the day two individuals stationed in the Plaza between the Revco and the Finast stores, soliciting signatures on a petition to place on a state ballot a proposition to limit the terms of senators and representatives. At about 2 p.m. on Monday, April 11, 1994, the day before the hearing, when she was shopping at the Plaza, she saw an undisclosed number of individuals in the Plaza parking lot soliciting signatures to place a particular candidate on the November 1994 ballot. McAdoo testified that he did not know of the latter incident, and that he could not recall any term-limit solicitation.

In the fall of 1993, after the Union had filed the instant charge, McAdoo saw one Rick Laconti, whom McAdoo identified as—a person that did some contract work—passing out in the Plaza some brochures in connection with a forthcoming election for mayor of Mayfield Heights. McAdoo told Laconti that he could not pass out these brochures in the Plaza, whereupon he left.

Magocsy credibly testified that on a Friday, Saturday, and Sunday in March 1994, the Boy Scouts solicited in the Plaza for food for the poor. She further credibly testified that in the ''warmer months'' in 1993 and 1994, a troop of Girl Scouts sold cookies on Friday and all day Saturday. In addition, she credibly testified that the Knights of Columbus solicited in the Plaza for a camp for retarded children, on Fridays, Saturdays, and probably Sundays over 2-week periods in 1993 and 1994. Also, she credibly testified that Cleveland, Ohio, throughout the period she worked at the Plaza (that is, 1986-March 1994, except for 1990 and 1991), poppies to benefit veterans were sold around Memorial Day all day Friday and Saturday and sometimes on Sunday. In addition, she credibly testified that quite often in 1992 and 1993, after school and especially on weekends, school children sold candy in the Plaza to benefit various school projects, such as a school band or football team. As to the period of the union handbilling (June and July 1993), her testimony as to the selling (although not its purpose) was credibly corroborated by Madzelonka and Behannesey. McAdoo testified that he did not recall any of the foregoing activities. Maglosky testified that he had no knowledge of them.

During a period of at least a half day while the handbilling was being conducted, a deaf-mute solicited donations in the Plaza, in areas which included the frontage of Marc's store.

[16] These incidents are discussed infra. Also discussed infra are some incidents, which he described as a witness for Respondent, involving ''For Sale'' signs in the windows of cars parked in the Plaza.

Also while the handbilling was being conducted, raffle tickets were sold outside Marc's store for a 1-hour period. Maglosky and McAdoo, both of whom testified for Respondent, were not asked whether they were aware of this specific begging or raffle activity.

From time to time, and as late as the day before the hearing, some cars parked in the Plaza display signs in their windows that the vehicle in question is for sale. McAdoo credibly testified that on ''quite a few'' occasions, when the cars were parked for a length of time which could not be accounted for by the owner's shopping trip, he telephoned the number on the sign and told the owner he had to remove the car; and that these requests had always been complied with. He attached a November 1993 or December 1993 date to two of these incidents, and was not asked the dates of the other incidents. Maglosky credibly testified that on two occasions whose dates he was not asked, he had telephoned the number on the car's ''for-sale'' sign to ascertain whether the driver was shopping or employed at the center. He testified that he would take no action against such a shopper or employee, but otherwise, ''we would'' try to cause the removal of the car. He further testified that he had never asked the employer of an employee who had parked a car with an advertisement on it because he was working at the Plaza to have that sign removed.

McAdoo credibly testified that he had never called the police for somebody soliciting. Maglosky testified that the impetus for asking the Union's handbillers to leave was the complaints from Marc's and Shoe Connection, but that ''we'' would have asked the handbillers to stop handbilling even if no complaints had been received, and that this would have been in accordance with normal practice.

G. Analysis and Conclusions

1. Whether the handbilling, location aside, constituted protected activity

As an initial matter, Respondent seeks dismissal of the complaint on the ground that Respondent's action in requiring the handbillers to leave the Plaza ''did not impact the Section 7 rights of any employee.'' I disagree. In the first place, the handbillers included individuals who were in the active employ of unionized stores, including unionized stores (two of them on the Plaza itself) which the handbillers urged customers to patronize in preference to the nonunion Marc's. Laying to one side the physical situs of the handbilling, such activity by these employees was unquestionably protected by Section 7 of the Act.[17] At least where (as here) the employees engaged in such activities during hours when they were not expected to be actively working for their regular employers, the fact that the Union paid them for engaging in this activity did not render it unprotected.[18] Nor does the fact that these handbilling employees were not employed by Respondent privilege Respondent to take action against them for their protected handbilling activity. *Hudgens v. NLRB*, 424 U.S. 508, 510 fn. 3, 522 fn. 11 (1976); *Seattle-First National Bank*, 258 NLRB 1222 fn. 5 (1981).

In any event, the Board takes the position that handbilling by nonemployee union agents for the purpose of inducing customers to patronize unionized in preference to nonunionized stores does impact on employees' Section 7 rights, because such activities are conducted, at least in part, on behalf of employees of those unionized stores that customers were being asked to patronize.[19] No different conclusion is suggested by *Sparks Nugget v. NLRB*, 968 F.2d 991, 996–998 (9th Cir. 1992), on which Respondent relies. The court there held that as to nonemployee handbillers and picketers who were trying to reach customers rather than employees, the nonaccessibility exception to the rule that an employer need not accommodate nonemployee organizers on his own property does not apply.[20] Plainly, no such analysis would have been called for if the court had concluded that such appeals to customers did not impact employee rights at all. Moreover, any such conclusion would have rendered wholly irrelevant the court's action in leaving open, at least, the question of whether the employer could lawfully have excluded such handbillers and picketers while permitting other distribution by third persons on the employer's property.[21]

For the foregoing reasons, I conclude that the distribution of the ''raisin'' and ''kids'' handbills, to customers and prospective customers of the nonunionized Marc's store by employees of the unionized stores which the handbills asked customers to patronize instead of Marc's, by employees of

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[17] *Circle Bindery*, 218 NLRB 861 (1975), enfd. 536 F.2d 447 (1st Cir. 1976); *Highland Superstores*, 314 NLRB 146 (1994); *Firestone Tire & Rubber Co*., 238 NLRB 1323 (1978), enfd. 651 F.2d 1172 (6th Cir. 1981); *Wolfie's*, 159 NLRB 686, 694–695 (1966); *Rudy's Farm Co*., 245 NLRB 43, 48–49 (1979); *Sears, Roebuck & Co*., 168 NLRB 955, 956–957 (1967); *National Football League*, 309 NLRB 78, 119–120 (1992); *Emerson Electric Co. v. NLRB*, 650 F.2d 463, 474 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982); and *Davis Supermarkets, v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993), cert. denied 114 S.Ct. 1368 (1994); see also the cases cited infra fn. 19.

[18] See *National Football League*, supra at 119–120; *Tubari Ltd. v. NLRB*, 959 F.2d 451, 455 (3d Cir. 1992). Surely, an employer which discharged its own employee because he was president of a union could not effectively defend such conduct merely by showing that the union paid the employee for his services as president. See *Sioux Falls Stock Yards Co*., 236 NLRB 543, 549–550 fn. 38 (1978). I note that union business representative Madzelonka testified, in effect, that the handbillers were paid in order to achieve the result of permitting contributions toward diverting business from nonunion stores to be made by members in the form of services rather than money.

[19] *Great Scot, Inc*., 309 NLRB 548 (1992); *Bristol Farms*, 311 NLRB 437 (1993); *Payless Drug Stores Northwest*, 311 NLRB 678 (1993); *Oakland Mall*, 304 NLRB 832 (1991); *Wegmans Food Markets*, 300 NLRB 868 (1990); and *D'Allessandro's, Inc*., 292 NLRB 81, 83 (1988); and *Polly Drummond Thriftway*, 292 NLRB 331 (1989).

[20] See *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), discussed at greater length infra.

[21] In *Davis Supermarkets*, supra at 1177, the District of Columbia Circuit strongly suggested that communications by nonemployee union agents with customers do not impact on employee rights. This comment constituted dictum, in view of the fact that there (as here) the communications activity at issue was engaged in by employees as well as by nonemployees. In any event, I am expected ''to apply established Board precedent which the Board or the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.'' *Iowa Beef Packers*, 144 NLRB 615, 616–617 (1963), modified 331 F. 2d 176 (8th Cir. 1964).

other unionized stores, and by nonemployee union agents, impacted employees' Section 7 rights.[22]

2. Whether Respondent discriminated against the distribution of union handbills

As Respondent does not appears to question, Respondent violated Section 8(a)(1) by demanding that employees and other persons leave the Plaza because they were engaging in solicitation/distribution protected by the Act, and by summoning the police to exclude them from the Plaza, if such exclusion discriminated against such protected activity by allowing other solicitation/distribution. *NLRB v. Babcock & Wilcox, Co.*, 351 U.S. 105, 112 (1956); *Lechmere*, supra, *Great Scot*, supra, 309 NLRB 548 fn. 2; *Pay Less Drug Stores Northwest*, 312 NLRB 972, 973–974 (1993); *Davis Supermarkets*, 306 NLRB 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993), cert. denied 114 S.Ct. 1368 (1994); and *Richards United Super*, 308 NLRB 201 (1992).[23] I agree with the General Counsel that such disparate treatment is shown by the evidence. As to Respondent's knowledge of other solicitation/distribution I find, in view of the probabilities of the case and Maglosky's inspection practices, and after considering his demeanor and the internal inconsistencies in certain parts of his testimony,[24] that he observed at least some of the incidents of on-Plaza solicitation and distribution (in addition to the union handbilling) between January 1992 and the April 1994 hearing, the most likely subjects being the 2-week solicitation in May 1992 of signatures on a petition to put a term-limit proposition on a state ballot and the candy-selling (observed by Magoscy and the handbillers) by school children in 1992 and 1993 to benefit various school projects; I do not credit his testimony otherwise, or (accordingly) his testimony that he tried to enforce a no-solicitation policy consistently. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Because Maglosky was admittedly a supervisor and was in charge of Respondent's Plaza operations, his knowledge is unquestionably attributable to Respondent,[25] which makes no claim that it ever sought to halt this activity. Moreover, in view of McAdoo's relatively constant presence at the Plaza during his working hours, and after considering his demeanor and certain internal inconsistencies in his testimony (see supra sec. II,D,F), I find that McAdoo was likewise aware of some of the unimpeded solicitation and distribution activity, and I do not credit his testimony otherwise. Because McAdoo's duties include attempting to stop unwelcome activity on the Plaza and reporting such activity to his superior, Maglosky, and because during most of McAdoo's duty hours he was the only individual in Respondent's employ who was in a position to observe or immediately halt such unwelcome activity, I conclude that both his knowledge of and his failure to take action against or report such solicitation and distribution activity are attributable to Respondent.[26] Accordingly, I find that by interfering with the handbillers' protected handbilling activity on the Plaza, Respondent discriminated against such activity while permitting on-Plaza activity for, at least, political and charitable purposes. Therefore, by demanding that the handbillers cease such protected activity on the Plaza, and by summoning the police for the purpose of having them removed from the Plaza, Respondent violated Section 8(a)(1) of the Act.

My analysis up to this point has been consistent with Respondent's contention that to establish a discriminatory-enforcement violation, it must be shown that Respondent had specific knowledge of on-Plaza solicitation/distribution activity for purposes other than the barred union activity. However, I do not agree with Respondent that such specific knowledge need be shown under the circumstances presented here. Even assuming the truth of Maglosky's and McAdoo's testimony that they did not know about any of the solicitation/distribution activity against which no action was ever taken, the fact remains that the union handbilling here was halted by Respondent while a substantial amount of solicitation/distribution for political, commercial, and charitable purposes (including begging) took place on the Plaza unimpeded both before and after the handbill incident. Moreover, this de facto discrimination was the natural and probable result of the manner in which Respondent chose to enforce its alleged rule against solicitation and distribution. Respondent chose to police this alleged rule mostly through McAdoo, and chose to exclude, from his usual work schedule, weekends and weekday hours after 3:30 p.m. However, when setting McAdoo's schedule Respondent must have known that the days and hours outside his regular duty hours are precisely the days and hours when solicitation/distribution are most likely to occur—that is, the days and hours when the greatest number of people are likely to be shopping at the Plaza, and when students and employed persons are most likely to have free time available to solicit and distribute. Moreover, although during the handbilling Respondent posted in the Plaza signs which restricted the length of parking, not until after halting the handbilling did Respondent post ''No solicitation'' signs whose number and location were even arguably sufficient to be observed by at least most Plaza visitors. Before the handbilling ended, the former ''No solicitors allowed'' signs were not visible to the drivers who used at least three of the four driveways from S.O.M. Road, and/or from most (and perhaps all) of the Plaza itself; in-

[22] Some of the more than 36,000 distributed handbills likely reached Marc's employees. Moreover, it is not unlikely that the ''kids'' handbills, at least, suggested to at least some of the younger Marc's employees that their on-the-job safety might be improved if they were unionized. However, because Madzelonka's explanation of the Union's purposes in distributing the handbills did not include any appeals to Marc's employees and because none of the parties has addressed this possibility, it has been disregarded.

[23] *Lechmere* dealt with a retail store's exclusion of nonemployee handbillers and picketers from a parking lot owned by the store whose employees the handbillers/picketers were seeking to organize. Absent a more thorough briefing of the issue, I do not consider the General Counsel's possible contention that *Lechmere* may not be wholly applicable to a shopping plaza or shopping mall.

[24] When called by the General Counsel as an adverse witness, Maglosky credibly testified that McAdoo had never brought to Maglosky's attention any type of solicitation. When called by Respondent's counsel, Maglosky testified that McAdoo had reported to him about the union handbillers and about the Hunan restaurant's action in placing advertisements under the windshield wipers of cars parked in the Plaza. See also infra fn. 27 and attached text.

[25] *Pinkerton's, Inc.*, 295 NLRB 538 (1989).

[26] See *NLRB v. McEver Engineering*, 784 F.2d 634, 640 (5th Cir. 1986); *United Aircraft Corp. v. NLRB*, 440 F.2d 85,92 (2d Cir. 1971); and *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117–118 (6th Cir. 1987), rehearing denied 833 F.2d 605 (6th Cir. 1987).

deed, Maglosky initially testified, as an adverse witness called by the General Counsel, that he did not notice these signs until 2 months after becoming the Plaza property manager in January 1992.[27] I conclude that by excluding the union handbillers, while casually, haphazardly, and lackadaisically policing with respect to other solicitation/distribution activity Respondent's alleged no-solicitation rule, Respondent discriminated against the union handbilling within the meaning of *Babcock & Wilcox*, supra at 112. See *Union Child Day Care Center*, 304 NLRB 517, 524–525 (1991); *Albertson's Inc*., 307 NLRB 787, 795 (1992) (''enforcement of a rule on a sporadic or haphazard basis for other activities may render it ineffective against union activities'').[28] ''[A] man is held to intend the foreseeable consequences of his conduct.'' *Radio Officers Union v. NLRB*, 347 U.S. 17, 45 (1954). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by excluding from the Plaza union handbilling but not a substantial amount of solicitation/distribution for other causes, even assuming that Respondent did not specifically observe the latter activity.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by demanding that the Union cease its efforts (through personnel employed solely by it and through employees also employed by other employers) to distribute on the Eastgate Plaza handbills which requested customers to patronize unionized rather than nonunion stores, and by calling the police to eject the handbillers from the Plaza, while permitting on the Plaza solicitation and the distribution of literature for other purposes.

4. The unfair labor practice described in Conclusion of Law 4 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has violated the Act in certain respects, I shall recommend that Respondent be required to cease and desist from such conduct, and like or related conduct, and to post appropriate notices.[29]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[30]

ORDER

The Respondent, Cleveland Real Estate Partners, Mayfield Heights, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Demanding that the United Food and Commercial Workers Union Local No. 880 AFL–CIO, CLC cease its efforts (through personnel solely employed by it and through employees also employed by other employers) to distribute protected literature on the Eastgate Plaza, and calling the police to eject the handbillers from the Plaza, while permitting on the Plaza solicitation and the distribution of literature for other purposes.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its office and other conspicuous places in Eastgate Plaza copies of the attached notice marked ''Appendix.''[31] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

[27] Later, on examination by his own counsel, he testified as follows:

Q. When did you become aware of [the signs]?

. . . .

A. Last summer [1993].

. . . .

Q. You had never seen them before last summer?

A. Oh, I've seen them before, but I didn't notice that they were in the shape they were in.

Q. When did you first notice or learn that those signs were posted at [the Plaza]?

A. When I took the property over [in January 1992].

[28] In contending that unlawful disparate enforcement cannot be found unless the respondent had specific knowledge of the solicitation/distribution activity against which no action was taken, Respondent relies on *Adams Super Market Corp*., 274 NLRB 1334, 1338 (1985), and on *Hoyt Water Heater Co*., 282 NLRB 1348, 1357 (1987). However, in neither of these cases was there any finding that the respondent's means of policing the rule would foreseeably leave substantial breaches undetected.

[29] Respondent's only office on the Plaza is a small maintenance office used by McAdoo.

[30] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[31] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT demand that the United Food and Commercial Workers Union Local 880 AFL–CIO, CLC cease its efforts (through personnel employed solely by it and through employees also employed by other employers) to distribute protected literature on the Eastgate Plaza, and call the police to eject the handbillers from the Eastgate Plaza, while permitting on the Plaza solicitation and the distribution of literature for other purposes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

CLEVELAND REAL ESTATE PARTNERS